Dispute Resolution Mechanism for Treatment Issues in California
By Bertram Cohen

Workers' compensation dispute resolution begins with the California Constitution, Article 14, Section 4 of which vests the Legislature with plenary power to establish by legislation a complete system of workers' compensation, including "full provision for such medical, surgical , hospital and other remedial treatment as is requisite to cure and relieve from the effects of [an industrial] injury." The Legislature is mandated to create an administrative agency with "all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." The Constitution provides that dispute resolution may be accomplished by arbitration, by an industrial accident commission, by courts, or any combination.

The Legislature has chosen to accomplish that mission by creating the Division of Workers' Compensation (DWC) and the Workers' Compensation Appeals Board (WCAB or Board). The two coexist within the state Department of Industrial Relations, and have overlapping functions. For example, the WCAB, which under Labor Code Section 111 is vested with all judicial powers conferred by the Code, hears and decides cases, but the DWC hires the WCAB's district judges and staff, and establishes the working environment. (The term "WCAB" commonly refers both to the seven-member politically appointed Appeals Board that sits in San Francisco and hears petitions for reconsideration, and the 25 district offices around the state staffed by judges and other DWC personnel.) In most instances the WCAB through its judges resolves disputes at the trial level, but in other instances arms of the DWC may initially resolve a dispute (e.g., entitlement to vocational rehabilitation benefits or whether an employer may require a worker to change doctors), and an appeal from that decision is taken to the district WCAB office. The Appeals Board in San Francisco is always the tribunal that has the final say in the matter, subject only to review by the Courts of Appeal and the Supreme Court.

With respect to medical treatment disputes the WCAB has exercised its jurisdiction, since the beginning of the system 90 years ago, over virtually every aspect of the issue. Whether the issue is need for treatment, modality thereof, identity of the treating physician, or costs, the WCAB has, and continues to act, as trier of fact. With respect to compensation issues it acts just like any court; formal hearings are conducted with testimony under oath, and documents are received in evidence. Unlike civil courts, however, oral medical testimony is seldom taken, due to the abbreviated nature of the proceedings, and treatment issues are dealt with through medical reports. Over the years the WCAB has handled every issue conceivable, related to medical treatment. Much legislation has been enacted over the years to deal with special situations, but virtually all of it relates to evidentiary issues, and does not affect the WCAB's basic jurisdictional authority. In the 90's many important changes were made with respect to the obtaining of medical evidence and its effect. Most, however, dealt with presumptions affecting the burden of proof and admissibility of evidence, and left the WCAB's decisional powers essentially intact, although sometimes exercised at the second level of litigation. For example, as noted above the DWC Administrative Director initially decides the issue when an employer or carrier wishes to require a worker to select an employer-designated

physician to take over treatment. Any appeal from the AD's decision is taken to the WCAB.

The basic yardstick by which the Board resolves treatment issues is found in Labor Code Section 4600, which quite simply provides for such medical treatment as is "reasonably required to cure or relieve from the effects of the injury." (Note that the Constitution states that treatment shall be provided to "cure and relieve," thus the Labor Code sets an even broader standard by providing for care that may not cure, but is only palliative in nature.)

In view of concerns over the steeply rising costs of medical care, over the years much effort has gone into modifying the manner in which evidence is considered on treatment and evaluation issues. Detailing all of it would be beyond the scope of this discussion, but one or two examples are illustrative. Since 1993 the Labor Code has provided that the treating physician's opinion is entitled to a presumption of correctness, unless both parties opt to obtain evaluations from Qualified Medical Examiners (QMEs) or agree to an AME. Creation of the presumption was designed to minimize the use of evaluators, thus keeping medical-legal costs down. It does not affect the Board's jurisdiction over treatment issues, but simply severely limits the evidence that can be offered on treatment issues. Evidence is also affected by the Official Medical Fee Schedule, which for many years has attempted to regulate the costs of most types of treatment. The OMFS creates a schedule that is prima facie evidence of reasonableness, but is not binding on physicians who can justify fees in excess of the OFMS but not in excess of their usual and customary charges.

Some changes in recent years are of a much different nature, in that they attempt to remove treatment issues from the purview of the WCAB and substitute other methods of dispute resolution, at least at the outset. An example is Alternative Dispute Resolution (ADR), under which certain groups (e.g., the construction industry and its workers) enter into a plan to provide benefits with disputes submitted to an ombudsman whose determination is subject to arbitration and mediation. Only after those steps are taken may the WCAB's jurisdiction be invoked. The Board thus does not lose jurisdiction, but its use is put off until the ADR procedure is completed. As indicated above, another area in which the Board's authority is invoked only after dispute resolution is attempted elsewhere is that of change of physician; the employer's effort to remove treatment from a doctor of the worker's choice is first placed before the AD, and is appealable to the WCAB.

From time to time, crises appear that require some adjustment to the dispute resolution mechanism. The AD and the Board handle them as they arise. For example, not long after enactment of the 1989 reform legislation the claims adjudication system became bogged down with huge numbers of lien claims filed by self-procured treating entities, primarily in Southern California. The crisis was largely resolved by creation of a special Lien Unit that processed nothing but liens, on an accelerated basis, freeing up district office calendar time. More recently, costs of treatment rendered by outpatient surgical centers has become a "hot button" issue, and will likely be the subject of new regulatory efforts.